

¹ Claimant was also provided notice of oral argument, but did not appear.

ISSUES

1. Did the ALJ err in refusing to allow respondent to withdraw its stipulations?
2. Did the ALJ err in admitting the medical report of Sergio Delgado, M.D., in violation of K.S.A. 44-519?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire file, the Board finds the Award of the Administrative Law Judge granting claimant a 5 percent impairment to the left upper extremity at the level of the shoulder on a functional basis should be affirmed.

Claimant alleges accidental injury on April 29, 2001, when, while preparing french fries for respondent, she began developing problems in her left upper extremity. Claimant developed significant pain and was unable to raise her arm without pain. Claimant was referred to Dennis Anthony, D.C., for chiropractic treatments consisting of spinal manipulation and physical therapy modalities. She was treated from May 2 through May 26, 2001, showing improvement in her symptoms. She was then referred to Michael Geist, M.D., for medical evaluation and treatment. Radiographic studies of her left shoulder were within normal limits, and she was referred for physical therapy and obtained medications as well. She was then referred to Mary Ann Hoffman, M.D., an orthopedic surgeon, who diagnosed tendinitis. Claimant was treated with deltoid cortisone injections, which apparently made her worse. Claimant was then returned to work activities, but remained symptomatic in her left shoulder and arm. She left her employment with respondent in October of 2001. Claimant has since obtained employment at K-Mart and began working as a cashier in December of 2001.

Claimant was referred to Sergio Delgado, M.D., a board certified orthopedic surgeon, by the ALJ for an independent medical examination and evaluation. The court's Order of January 10, 2002, was pursuant to "K.S.A. 44-510e(a) and/or K.S.A. 44-516." Dr. Delgado's evaluation, which occurred on February 13, 2002, was memorialized in a report dated February 15, 2002. That report, which was filed with the Workers Compensation Division of the State of Kansas on February 20, 2002, was then considered by the ALJ for the purposes of his award.

After a thorough examination and evaluation, Dr. Delgado determined that claimant suffered from chronic left bicipital tendinitis at the level of the bicipital groove of the proximal left arm. Dr. Delgado opined claimant had suffered a 5 percent impairment to the

left upper extremity at the level of the shoulder pursuant to the fourth edition of the *AMA Guides*.²

In January of 2002, the matter proceeded to a pre-hearing settlement conference (PHSC), and respondent stipulated that claimant suffered accidental injury arising out of and in the course of her employment and stipulated to an average weekly wage of \$506.36.

The matter was originally scheduled for regular hearing on November 13, 2003. By that time, claimant's original attorney, Roy T. Artman, had already withdrawn his appearance, having been released by claimant. After a conference between the ALJ and the parties, it was determined that a settlement was possible and the parties were instructed to proceed forward with the settlement negotiations. The court also expressed concern at that time that claimant was unrepresented, stating that,

. . . the court does not think that the claimant is in a position to represent herself. She doesn't have her papers in the file that Mr. Kubin has in the case, and I am sure that she would not be able to present any evidence that would be admissible, so the court is going to continue this hearing for 30 days to give the parties a chance to settle it.³

The matter did not settle and respondent's attorney, Mr. Kubin, requested that it again be scheduled for regular hearing, with this regular hearing being set for August 17, 2004. In his July 8, 2004 letter to the ALJ, which was copied to claimant, respondent's attorney advised that respondent wished to withdraw its stipulation as to accident and wage, which had originally been agreed to at the PHSC in January 2002.

The regular hearing was held August 17, 2004. While notice was sent to claimant and claimant initially appeared, the hearing was not attended by claimant after her conference with the ALJ. Claimant and the ALJ had had difficulties in this matter, with claimant earlier filing a motion demanding that the ALJ recuse himself, which he denied.

The regular hearing was then replaced with an on-the-record conversation between the ALJ and respondent's attorney regarding the motion to withdraw stipulations.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

³ Trans. of Proceedings (Nov. 13, 2003) at 3-4.

At the time of the August 17, 2004 hearing, the ALJ denied respondent's motion to withdraw the stipulations regarding accident arising out of and in the course of employment and wage. The ALJ's specific order is as follows:

Judge Avery: Okay. As I informed you, Mr. Kubin, I'm going to deny the motion to withdraw the stipulation regarding accident and arising out of [sic] the course of and wage. You are free, of course, within your terminal dates of submitting additional evidence you may have regarding those issues. But for now, the – at least the stipulations entered at the pre-hearing settlement conference will remain as the record of the Court.

Mr. Kubin: Well, your Honor, I just might point out that there was no record – there's no Court record of the pre-hearing settlement conference –

Judge Avery: There was no –

Mr. Kubin: – only the notes of counsel and the Court. There was no official record.

Judge Avery: I understand. There was the notes that the Court recorded as the stipulations, and I – it's my understanding you're not disputing the accuracy of the original stipulations, you're disputing your action to withdraw the stipulation.

Mr. Kubin: Correct, your Honor. Subsequent investigations has made those – those stipulations in error.⁴

Respondent argues that its right to withdraw those stipulations should have been granted, citing K.A.R. 51-3-8, which states that pre-trial stipulations shall be taken at the first full hearing, with the parties to present themselves ready to stipulate to all issues which cannot be legitimately contested. K.A.R. 51-3-8 states,

(b) An informal pre-trial conference shall be held in each contested case before testimony is taken in a case. At these conferences, the administrative law judge shall determine from the parties what issues have not been agreed upon. If the issues cannot be resolved, the stipulations and issues shall be made a part of the record.

(c) The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage.

⁴ R.H. Trans. (Aug. 17, 2004) at 6-7.

The Board acknowledges that under certain circumstances, it is appropriate for a party to withdraw stipulations made at a PHSC. K.A.R. 51-3-8(e) states “[p]ermission to withdraw admissions or stipulations shall be decided by the administrative law judge, depending on the circumstances in each instance.”

The ALJ denied respondent’s motion in this case. However, a review of the specific language used by the ALJ indicates that, while he denied the motion to withdraw the stipulations, he went on to state that respondent was free within its terminal dates to submit additional evidence regarding those issues. The ALJ went on to state “[b]ut for now, the – at least the stipulations entered at the pre-hearing settlement conference will remain as the record of the Court.”⁵

For whatever reason, respondent did not avail itself of the opportunity to provide evidence regarding whether claimant suffered accidental injury arising out of and in the course of employment and claimant’s average weekly wage, even though the opportunity to do so was made available by the ALJ.

In this instance, the ALJ, while initially denying respondent’s motion, gave respondent the opportunity to present evidence regarding its request. Respondent, for unknown reasons, elected not to present evidence regarding those issues. In short, respondent failed to establish any support for its request. The Board finds that respondent has failed to prove the ALJ erred in refusing to allow respondent to withdraw its stipulations.

Respondent contends that the IME report of Dr. Delgado was admitted into the record in violation of K.S.A. 44-519. K.S.A. 44-510e(a) and K.S.A. 44-516, both of which were cited in the ALJ’s Order appointing Dr. Delgado, allow for the utilization of independent medical examinations when disputes arise and the Director or the administrative law judge determines it appropriate. K.S.A. 44-510e(a) states, in part,

If the employer and the employee are unable to agree upon the employee’s functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee’s functional impairment which shall be considered by the administrative law judge in making the final determination.

⁵ R.H. Trans. (Aug. 17, 2004) at 7.

Respondent argues K.S.A. 44-510e relates to permanent partial general disability or work disability. Respondent argues the procedures under K.S.A. 44-510e are not appropriately utilized when dealing with scheduled injuries under K.S.A. 44-510d. The Board acknowledges there is no language under K.S.A. 44-510d similar to that under K.S.A. 44-510e. Therefore, that particular section of the statute may not relate to scheduled injuries. However, K.S.A. 44-516 states,

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider **shall be considered** by the administrative law judge in making the final determination. (Emphasis added.)

As noted above, the Order of the ALJ appointing Dr. Delgado to perform the independent medical examination cited both K.S.A. 44-510e(a) and K.S.A. 44-516. The Board rejects respondent's argument that K.S.A. 44-516 is somehow attached to K.S.A. 44-510e and, thereby, limited only to permanent partial general body disabilities. K.S.A. 44-516 has no such restriction or limitation in its language.

As a general rule, statutes are construed to avoid unreasonable results. There is a presumption that the legislature does not intend to enact useless or meaningless legislation.⁶

The fundamental rule of statutory construction to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be.⁷

The Board, therefore, finds that K.S.A. 44-516 may be appropriately utilized even when an injury is listed under the schedules contained in K.S.A. 44-510d. Therefore, the independent medical examination of Dr. Delgado was properly considered by the ALJ in determining this matter. As Dr. Delgado's report is the only medical evidence in the case, the Board finds that claimant has proven that she has suffered a 5 percent permanent partial functional impairment to the left upper extremity at the level of the shoulder. Therefore, the Award of the ALJ should be affirmed.

⁶ *In re M.R.*, 272 Kan. 1335, 1342, 38 P.3d 694 (2002).

⁷ *Williamson v. City of Hays*, 275 Kan. 300, 305, 64 P.3d 364 (2003).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated November 5, 2004, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Beverly F. Kuester, pro se Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director